LE COPY

Office-Supreme Court, U.S.
FILED
MAY 4 1959
JAMES R. BROWNING, Clerk

No. 799

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM H. ANDERSON AND HARRY J. HAGEN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys,
Department of Justice, Washington 25, D.C.

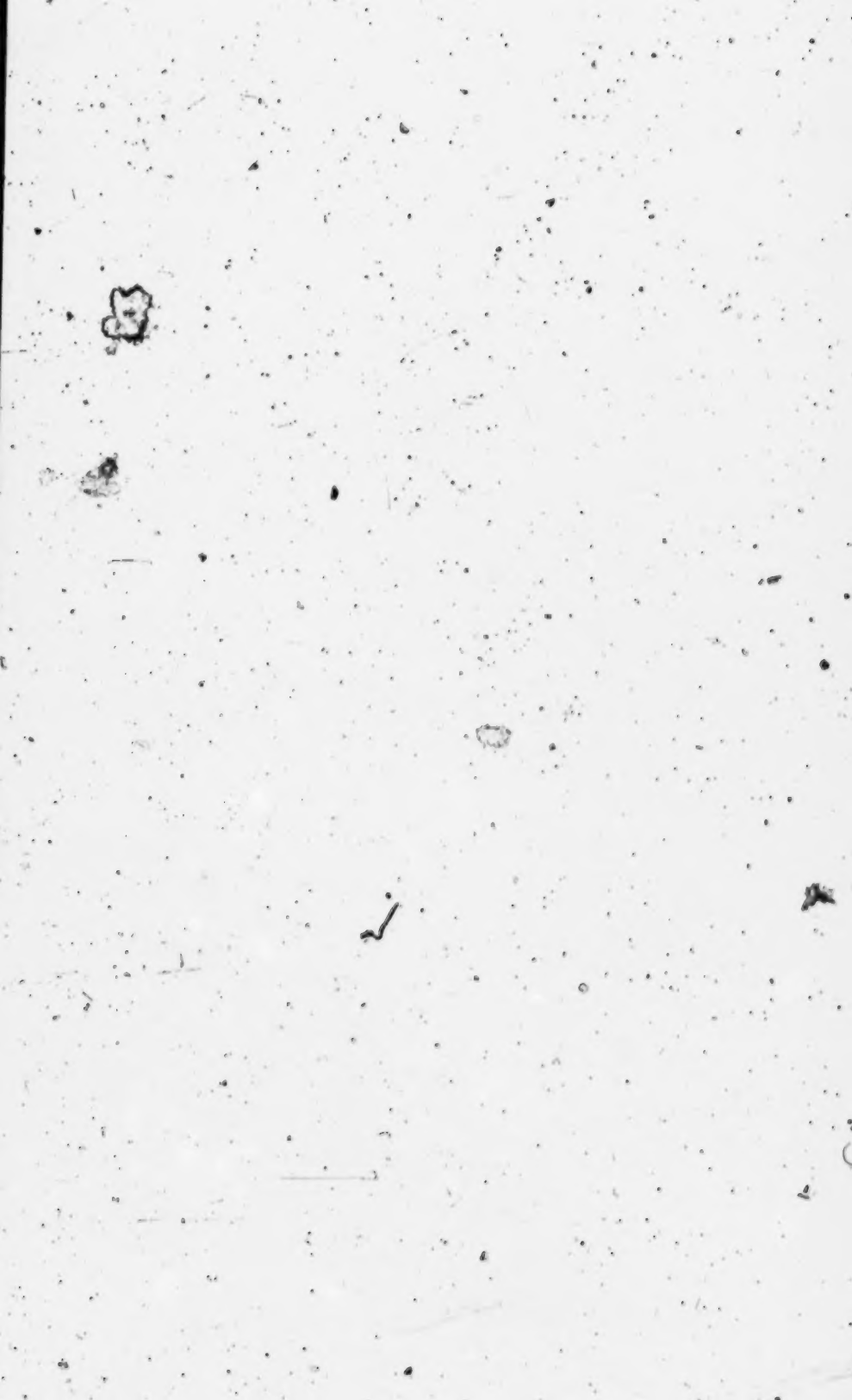
INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
1. The government's evidence	4
2. Production of statements of government witnesses	7
3. Newspaper publicity during the trial	9
4. Court's inquiry of jury	10
Argument	12
Conclusion	16

CITATIONS

Cases:	
Brasfield v. *United States*, 272 U.S. 448	15
Dunn v. *United States*, 284 U.S. 390	13
Hart v. *United States*, 112 F. 2d 128, certiorari denied, 311 U.S. 684	15
Hulahan v. *United States*, 214 F. 2d. 441, certiorari denied, 348 U.S. 856	12, 13
Jencks v. *United States*, 353 U.S. 657	8, 9, 10, 14
Marshall v. *United States*, No. 383, this Term	15
Shushan v. *United States*, 117 F. 2d 110, certiorari denied, 313 U.S. 574	15
United States v. *Anderson*, 154 F. Supp. 374	7
United States v. *Frank*, 151 F. Supp. 866, affirmed, 245 F. 2d 284, certiorari denied, 355 U.S. 819	15
United States v. *Gicinto*, 114 F. Supp. 204, affirmed, 212 F. 2d 8, certiorari denied, 348 U.S. 884	15
United States v. *Keegan*, 141 F. 2d 248, reversed on other grounds, 325 U.S. 478	15
Welch v. *United States*, 135 F. 2d 465, certiorari denied, 319 U.S. 769	15
Statute:	
18 U.S.C. 1951	2, 3, 12

505053—58——1



In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 799

WILLIAM H. ANDERSON AND HARRY J. HAGEN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 257–275) is reported at 262 F. 2d 764. The opinion of the District Court denying defendants' pre-trial motion to produce is reported at 154 F. Supp. 374.

JURISDICTION

The judgments of the Court of Appeals were entered on January 28, 1959 (R. 276, 277). A petition for rehearing was denied on February 26, 1959 (R. 289). The petition for a writ of certiorari was filed on March 27, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were properly charged and convicted of attempting to affect interstate commerce by extortion, in violation of 18 U.S.C. 1951.

2. Whether, where petitioners were given all statements of government witnesses signed or approved by them, and the trial judge examined the F.B.I. files and found no other such statements, petitioners were further entitled to receive all F.B.I. summaries and reports which referred to any interviews with the witnesses.

3. Whether, where the trial court instructed the jurors not to read newspaper articles about the trial, and there was no showing, or attempt to show, that the jurors had disregarded the instruction, petitioners were denied a fair trial merely because of the publication of critical articles about the trial.

4. Whether prejudicial error resulted when the trial judge, in ascertaining whether the jury should be excused for the night, inquired generally how they stood, and the foreman replied that they were "pretty evenly divided."

STATUTE INVOLVED

18 U.S.C. 1951, commonly known as the Hobbs Act, provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000

or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * * * * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT

Petitioners and Vincent J. Lee were indicted in three counts of violating the Hobbs Anti-racketeering Act, 18 U.S.C. 1951 (R. 1–6). Count II charged the defendants with obstructing, delaying and affecting commerce by extortion (R. 3–4); Count I charged a conspiracy to do so (R. 1–3); and Count III charged an attempt to do so (R. 5–6). Each count charged that the alleged extortion consisted of an attempt to obtain $12,500 from Richard I. Johnson by threatening him and his company with physical violence, and by misusing the defendants' position as union officials in refusing to permit union workmen to begin work on a construction project until the money was paid.

After a three week trial, the jury found both

petitioners guilty under Count III and acquitted them on the other counts. Their co-defendant Lee was acquitted on all counts (R. 23, 215). Each petitioner was sentenced to five years imprisonment (R. 238–240). The Court of Appeals for the Eighth Circuit unanimously affirmed the convictions (R. 257–275).

1. THE GOVERNMENT'S EVIDENCE

Petitioner William H. Anderson was the business representative of the Plasterers Union, President of the St. Louis Lathing and Plastering Industry Council, and Treasurer and Chairman of the Board of the Plasterers' Welfare Fund (R. 176). Petitioner Harry J. Hagen was the representative for the Lathers District Council in St. Louis, Vice President of the St. Louis Lathing Industry Council, and First Vice President and Chairman of the Executive Board of the Lathers International Union (R. 153).

Richard I. Johnson was a lathing and plastering contractor. In 1950, he became interested in bidding on the plastering and lathing work at a Veterans Administration Hospital under construction in St. Louis, Missouri (R. 26). The Del E. Webb Construction Co. was the general contractor for the hospital (Pet. 23).

In November 1950, Johnson and his general manager, Russell Hanson, went to St. Louis to investigate conditions there. Arrangements were made for Johnson to meet petitioner Anderson at petitioner Hagen's home (R. 254, 28). At this meeting, Anderson asked Johnson what it was worth to come into St. Louis and not have union troubles (R. 29–

30). Johnson offered two Cadillacs, but Anderson stated "We are interested in money", and asked for $18,000.00. Johnson then offered to pay $12,500.00, at $1,000.00 per month. Anderson said he would have to check with another party and told Johnson not to mention the conversation to anyone or he "wouldn't live long enough to regret it" (R. 30).[1] During this conversation in Hagen's basement, Hagen said nothing (R. 29). The following morning, Anderson told Johnson that he had talked with the third party and it was all right (R. 30).

On December 13, 1950, Johnson executed a subcontract with the Del. E. Webb company to supply the lathing and plastering work (R. 26–27). He subsequently subcontracted for the lathing work to be done by Charles W. Fawcett (R. 133, 135).

Johnson next met Anderson in September 1951 in Los Angeles, California, where Anderson asked for two thousand dollars "right then" (R. 31). When Johnson stated he didn't have it, Anderson said "You better get it," and Johnson replied, "I will do the best I can" (R. 254–255).

In November, 1951, one McAllister told Anderson he was thinking of contacting Johnson in regard to the plastering at the Veterans Hospital. Anderson said that, before he did, McAllister had better take it up with him (Anderson) because there had been some commitments made (R. 115–116).

Early in 1952, Johnson, who was in St. Louis, received a note that Anderson, who was in a hospital,

[1] Johnson subsequently repeated the substance of these discussions to Hanson (R. 93–94).

wanted to see him (R. 36). When Johnson arrived, Anderson asked for some money, and Johnson told him he did not have any. Anderson then told him he had better get it. He related how a car had blown up when the starter was turned on and said that, unless Johnson got some money, the same thing could happen to him (R. 36).

In February 1952, Johnson signed a contract with McAllister for the plastering on the hospital (R. 137). Johnson had shipped supplies for use in lathing to St. Louis from Los Angeles, California (R. 36, 46). He also had shipped to St. Louis some equipment which had been used on a project in Denver, Colorado (R. 37, 41, 44). Following the subletting of the lathing and plastering contracts, some of this material was removed to California (R. 43, 47, 45, 137, 133).

After McAllister began on the contract, Anderson asked him if Johnson had sent anything for Anderson. McAllister replied he did not know what he was talking about. At Anderson's request, McAllister subsequently repeated this to petitioner Hagen (R. 117).

In September 1952, Anderson approached Hanson and in the presence of McAllister inquired as to Johnson's whereabouts. When Hanson said that Johnson was not in St. Louis, Anderson gave him a business card and told him to give it to Johnson and tell him Anderson wanted to talk to him (R. 96, 117).

Johnson never commenced lathing or plastering on the hospital in St. Louis (R. 26, 35), and did not pay the money (R. 21, 26).

2. PRODUCTION OF STATEMENTS OF GOVERNMENT WITNESSES

Prior to the trial, the court, in denying as premature a defense motion for production of statements of witnesses, ruled that at the trial the defense could obtain "only continuous, narrative statements made by the witness recorded verbatim, or nearly so, by persons acting for the United States," and could not obtain those portions of "notes made during the course of an investigation (or reports compiled therefrom) which contain the subjective impressions, opinions or conclusions of the person or persons making such notes." *United States* v. *Anderson,* 154 F. Supp. 374, 375–376.

At the trial, the defendants requested production of statements made to the F.B.I., and reports thereof, involving government witnesses Johnson, Hanson and McAllister.

a. On cross-examination, Johnson testified that he had given a statement to the United States Attorney's office or the F.B.I. with respect to the "matters and things" that he had "mentioned" in his direct testimony (R. 48); and that he had had "one or two" interviews with the F.B.I. (R. 49). He recalled signing one statement (R. 49). The government turned over to the defense a typewritten statement dated February 2, 1956, and a typewritten report dated February 23, 1953 (R. 51, 54). The 1956 statement was signed by Johnson (R. 51–52). The court then granted an adjournment to the following day to permit the defendants to inspect them (R. 54).

The next day counsel for petitioners requested, on the basis of the *Jencks* case, that they be furnished with all reports written by the F.B.I. touching the events and activities with respect to which the witnesses had testified (R. 57). Although the court thought that the government had supplied all such reports (R. 65), it nevertheless looked over the F.B.I. files and concluded that the defendants had been given everything to which they were entitled (R. 69–70, 74). The court stated that the only reports which were not being turned over were those which "are written up in such a way that they state conclusions, and that are not statements, either written narratives and signed by the witness or oral statements made by the witness and recorded immediately by a representative of the FBI" (R. 76).

b. On cross-examination, Hanson originally testified that in 1953 an F.B.I. agent had interviewed him and taken down his statement (R. 96). When defense counsel called for production of that statement (R. 96), further examination of the witness brought out that he and Johnson had been interviewed together (R. 97). Hanson stated (R. 97) that during the interview "[p]redominantly the questions were directed to Mr. Johnson, and certain things that I could remember I would volunteer"; that the agent "was making various notes" but did not write down "word for word" what was being said or ask him to verify anything at the conclusion of the interview (R. 97). After the interview, the agent returned and read to Johnson and Hanson "a series of notes that he had typed up" (R. 98, 101–102). Hanson identified the

report with Johnson's name on it, which had already been given to defense counsel, as looking like the final notes which the agent had read to them (R. 98, 100–101).

c. McAllister stated that he had been interviewed by the F.B.I., but he did not recall whether the agent made notes of the conversation (R. 121). Petitioner's counsel moved that he be given any notes or statements of the witness which the government had. Government counsel said that he had no verbatim statement of that interview, but noted that defense counsel had previously been furnished with a copy of a statement which the witness had given to government counsel and upon which the witness had indicated his written approval (R. 121–122). Government counsel also stated (R. 122–123) that, although he had "no other statements," there were F.B.I. reports in which McAllister's name was mentioned, which had been submitted to the court. The court reserved decision, stating that it wished to review the file.

When the trial resumed the following week, the judge stated:

> * * * I have gone all through it over the week end and read the entire FBI file, but I find nothing more that I think you are entitled to and you have already been given. [R. 125.]

3. NEWSPAPER PUBLICITY DURING THE TRIAL

During the trial, an editorial appeared in a local paper concerning the effect of the *Jencks* decision on the case (R. 83). Defense counsel moved for a mis-

trial (R. 77). The court, noting that it had cautioned the jury not to read articles pertaining to the case (R. 78), asked the jurors to raise their hands if they had read the article. When none did so (R. 79), the court overruled the motion for a mistrial (R. 82).

Later, petitioner Hagen's counsel moved for a mistrial because of another article printed about the trial, and an editorial and cartoon about the *Jencks* case (R. 169–170, 173, 181). Defense counsel asked that "the jury should not be polled with respect as to whether or not they read this article * * *" (R. 169). The judge overruled the motion for a mistrial, stating that he was confident that the jurors were obeying his instructions and that such editorials do not influence jurors (R. 171).

In denying a subsequent motion for a mistrial on the same grounds, the court stated:

> This is almost the end of the third week of the trial * * *. I directed the jury not to read any newspaper reports or editorials, and in the absence of positive information that they disobeyed the Court's direction I am going to overrule the motion. [R. 182.]

4. COURT'S INQUIRY OF JURY

After the case was submitted to the jury, the trial judge sent for it at 9:40 p. m. (R. 212).

The court stated:

> * * * I don't want to have to keep you too late, and I want to make some inquiries. I want the foreman to speak for you. I want you to be very guarded, not volunteer any information that is not asked for. * * * [R. 212].

After discovering that they were not getting anywhere near a verdict (R. 212), the court noted that the weather was bad and that he did not want to keep the jury too late. The judge told the foreman (R. 213):

> * * * you may sound out the jury and answer for them, what is their view whether or not they would rather remain here longer in session tonight or rather be excused until tomorrow morning, or what, if any of them have any vital reason why they should not stay over I don't want to force them. * * * You may sound out the jury and tell me about that. Don't tell me how they stand or how they are divided. I might ask you this much, I want no numbers, don't tell me how much on one side or the other, but are they at all evenly divided, or is it very much one way or very much the other?
>
> The FOREMAN. It is pretty evenly divided, Your Honor.

The judge then inquired whether they wanted to continue or return the next day, and the foreman answered (R. 213):

> Your Honor, it appears that we are about evenly divided as far as coming back tomorrow or staying.
>
> The COURT. All right. It is your own fault. They have thrown themselves on the tender mercy of the Court, and the Court has no mercy.

After additional instructions in which the court emphasized the desirability of agreeing upon a verdict, the jury retired at 9:48 for further consideration

(R. 213–214). The verdict was returned at 12:30 a.m. (R. 248).

ARGUMENT

1. Petitioners were convicted under Count III of the indictment, which charged them with attempting to obstruct, delay, and affect commerce by extortion. The extortion charged consisted of an attempt to obtain $12,500 from Johnson by threatening him with personal violence, and refusing to permit union labor to work on the building project for which he had obtained the plastering and lathing contract. Petitioners contend that Count III did not charge an offense under the Hobbs Act; that the jury's verdicts were inconsistent in acquitting them under Count II (which charged the substantive offense) and convicting them under Count III; and that the jury was not properly instructed as to the count under which they convicted. These contentions are without merit.

A. The Hobbs Act broadly makes it a crime for any person who, "in any way or degree," obstructs, delays, or affects commerce by robbery or extortion, or "attempts or conspires so to do * * *." "[I]t was the intent of Congress to protect interstate commerce against extortion or attempted extortion which in any way or in any degree reasonably could be regarded as affecting such commerce." *Hulahan* v. *United States*, 289 F. 2d 441, 445 (C.A. 8), certiorari denied, 348 U.S. 856. An attempt to exact "tribute from contractors engaged in local construction work who are dependent upon interstate commerce for materials, equipment and supplies * * * is * * * pro-

scribed by the statute * * *." *Ibid.* Petitioners' unsuccessful endeavor to obtain $12,500 from Johnson in this case thus comes within the plain terms of the statute, since it involved an "attempt" to obstruct, delay, or affect "commerce by * * * extortion."

B. As the court below correctly ruled (Pet. 30), there was "no inconsistency between a jury's verdict of not guilty of conspiracy or of obstructing commerce but guilty of attempting to obstruct commerce, even though the basis for each charge springs out of the attempted extortion of $12,500.00 from Johnson and the threats of physical violence against him and his company's properties." It merely reflected the fact that petitioners' scheme to obstruct and affect commerce by extortion failed of accomplishment, and thus constituted no more than an attempt to do so. In any event, inconsistency in the verdict is no ground for reversal. The question is whether petitioners properly were convicted under Count III. *Dunn* v. *United States*, 284 U.S. 390. The court below correctly held that they were.

C. Petitioners attack on the charge to the jury is that the trial judge did not repeat the elements of the crime alleged in Count III. At the beginning of the charge, the judge explained the difference in the three counts (R. 194–195), and then charged as to matters common to all three counts, except that he did give special instructions on the matters pertaining to conspiracy (R. 196–198, 202). As the Court of Appeals found, the instructions as a whole "* * * fully and fairly apprised the jury of the law applicable to this case * * *" (Pet. 35).

The trial court was not required to repeat the elements involved in the attempt count.

2. During the trial, petitioners received copies of all statements made by government witnesses Johnson, Hanson, and McAllister which were either written and signed by the witness or recorded substantially verbatim by a government agent. The only material which petitioners did not receive were statements prepared by government agents which "are written up in such a way that they state conclusions" (R. 76, 59). Petitioners thus received everything to which they were entitled, under either the decision in *Jencks* v. *United States*, 353 U.S. 657, or the subsequent "Jencks" statute (18 U.S.C. 3500). As the court below pointed out (Pet. 32–33), the *Jencks* rule "does not mean that the defendants were entitled to sift the government files from top to bottom in the hope that they might turn up something of value to them."

While we accordingly believe that petitioners here received all the material to which they had a proper claim, we note that similar and related questions are now pending before this Court in several cases, particularly Nos. 435 to 437, and No. 471. In the circumstances, the Court may wish to postpone action in this case until those cases have been decided.

3. The trial court correctly rejected petitioners' various motions for a mistrial based on the allegedly prejudicial effect of newspaper stories which appeared during the trial. The courts have consistently held that there must be some showing that jurors have seen allegedly prejudicial publicity. *United States* v. *Gicinto*, 114 F. Supp. 204 (W.D. Mo.),

affirmed, 212 F. 2d 8 (C.A. 8), certiorari denied, 348 U.S. 884; *Hart* v. *United States*, 112 F. 2d 128 (C.A. 5), certiorari denied, 311 U.S. 684; *United States* v. *Keegan*, 141 F. 2d 248 (C.A. 2), reversed on other grounds, 325 U.S. 478; *Welch* v. *United States*, 135 F. 2d 465 (C.A.D.C.), certiorari denied, 319 U.S. 769; *United States* v. *Frank*, 151 F. Supp. 866 (W.D. Pa.), affirmed, 245 F. 2d 284 (C.A. 3), certiorari denied, 355 U.S. 819; *Shushan* v. *United States*, 117 F. 2d 110 (C.A. 5), certiorari denied, 313 U.S. 574. Here the trial court explicitly directed the jurors not to read any newspaper articles during the trial; there was an "absence of positive information that they disobeyed the Court's direction" (R. 182); and on one occasion petitioners opposed any polling of the jury "with respect as to whether or not they read this article" (R. 169). Thus, unlike *Marshall* v. *United States*, No. 383, this Term, pending decision, upon which petitioners rely (Pet. 18), no juror was shown to have read any of the articles, and petitioners opposed any interrogation of the jury on that question.

4. While an inquiry by the trial court as to the jury's precise numerical division may itself have such a coercive effect upon the minority as to constitute prejudicial error (*Brasfield* v. *United States*, 272 U.S. 448), such prejudicial effect cannot be presumed where the inquiry merely seeks in general terms to ascertain whether the division of the jurors is such as to make it appropriate to dismiss them for the night. Here the trial judge made it clear that he was only seeking to determine whether, at 9:40 on a rainy night, he should send the jury home or keep it longer. The

court explicitly told the foreman that it did not want him to "tell me how they stand or how they are divided," and that the only inquiry to be made of the jury was "whether or not they would rather remain here longer in session tonight or rather be excused until tomorrow morning" (R. 213). In response to this inquiry, the foreman advised that the jury was "pretty evenly divided," and also "evenly divided as far as coming back tomorrow or staying." After the court had given additional instructions on the desirability of reaching a verdict, the jury stayed out more than two hours longer, and its verdict acquitted one of the defendants on all counts and acquitted petitioners on two of the three counts. In the circumstances, we submit that the guarded inquiry by the court, and the general answer by the foreman that the jury was equally divided, did not constitute prejudicial error.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be ultimately denied, but for the reason stated *supra*, p. 14, the Court may wish to hold the petition for the time being.

J. LEE RANKIN,
Solicitor General.
MALCOLM R. WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

MAY 1959.

U. S. GOVERNMENT PRINTING OFFICE: 1959